No. 10409

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOR W. HENRICKSEN, formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellants

v.

BAKER-BOYER NATIONAL BANK, a corporation, Executor of the Estate of George T. Welch, deceased,

Appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR THE APPELLANTS

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
IRVING I. AXELRAD,
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J. CHARLES DENNIS,
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INDEX

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OPINION BELOW

The memorandum opinion (R. 61-78), findings of fact and conclusions of law of the District Court (R. 79-91) are not reported.

JURISDICTION

This appeal (R. 94-95) involves federal estate

taxes. The taxes in dispute were paid as follows: $7,843.29 and interest of $609.17 on November 1, 1939; $13,574.26 and interest of $1,209.56 on January 9, 1940 (R. 84); $998.57 and interest of $166.43 on March 24, 1941 (R. 85). Claim for refund was filed on April 30, 1940 (R. 84), and a supplemental claim for refund was filed on May 9, 1941 (R. 84-85), both pursuant to Section 910 of the Internal Revenue Code. The claim for refund was rejected by notice dated April 17, 1941, and the supplemental claim for refund was rejected on July 7, 1941. (R. 47.)

Within the time provided in Section 3772 of the Internal Revenue Code, and on August 19, 1941, the taxpayer brought an action in the District Court for the Western District of Washington for recovery of taxes paid. (R. 2-8) Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code. The judgment allowed the claim in full and was entered on February 15, 1943. (R. 92-93.) Within three months, and on March 16, 1943, a notice of appeal was filed (R. 94-95), pursuant to the provisions of Section 128(a) of the Judicial Code, as amended by the act of February 13, 1935.

QUESTIONS PRESENTED

1. The decedent bequeathed to his widow "for and during her lifetime all the rest, residue and re-

mainder" of his estate "including the rents, issues and profits therefrom * * * with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee" to charities after income from part of the remainder is paid to his son and grandson for their lives. (a) Did the will give the widow the right to invade the corpus? (b) If so, were the bequests to charities sufficiently definite and ascertainable as of the date of testator's death to be deductible in determining the net estate for estate tax purposes under Section 303(a)(3) of the Revenue Act of 1926?

2. The respondent and testator's widow entered into a stipulation to partition the estate approved by the Superior Court of the State of Washington. The respondent also brought suit against the Washington Inheritance and Escheat Division in the Superior Court of the State of Washington for (1) a determination that the residue of the estate for charity was for use in the State of Washington and (2) a construction of the will that the widow had no power to invade the corpus. The State had sought an additional inheritance tax because the residue of the estate to charities was not limited to the State of Washington. The Superior Court determined the

state inheritance tax issue against the State and in addition held that the widow had no power to invade the corpus. Are the decrees entered pursuant to stipulation and in the State tax proceeding that the widow had no power to invade the corpus conclusive for federal estate tax purposes?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Revenue Act of 1932, c. 209, 47 Stat. 169, Section 807, and Revenue Act of 1934, c. 277, 48 Stat. 680, Sections 403(a) and 406:

> SEC. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—
>
> * * *
>
> (3) The amount of all bequests, legacies, devises, or transfers, * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes * * *.
>
> * * *

Treasury Regulations 80 (1937 ed.):

> Art. 47. *Conditional bequests.*—
>
> * * *
>
> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole

or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The relevant facts as found by the District Court are as follows:

George T. Welch, the decedent, died on April 15, 1937, at Walla Walla, Washington, at the age of 95 survived by his widow, Carrie Welch, then aged 87, and by his son, Fred Welch, and a grandson, George Allen. He left an estate of $226,303. This was one-half of the community estate of which the other half under the laws of Washington belonged to the widow. The decedent and his widow had been married and lived together more than 50 years. (R. 62, 82.)

George T. Welch left a will dated in 1930 and a codicil, in 1931, which were admitted to probate by the Superior Court of the State of Washington, Walla Walla County, as his last will and testament. (R. 62, 82.) In the will, as modified by the codicil, he made two cash bequests of $500 each. (R. 62.) The remainder of his estate he left to his wife by the following language of Article V (R. 63-64):

* * * * unto my said wife, Carrie Welch, for

> and during her life time, should she survive me, all the rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits therefrom, and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, nevertheless, for the uses and purposes hereinafter mentioned * * * .

"Subject to the life estate hereinbefore given, devised and bequeath [sic] unto my said wife, Carrie Welch, in my estate, should she survive me as aforesaid," he gave his trustee, the respondent herein, $30,000, the income, if any, to be paid to his son, Fred B. Welch. He also gave to his son, subject to the life estate of the widow, his undivided one-half interest in certain realty as his son's absolute estate. (R. 62.)

Similarly, subject to the life estate of the widow, he gave the income from $12,500 in trust to his grandson, George B. Allen. The remainder of the $12,500 was bequeathed also in trust for admitted charitable use by the Board of Conference Claimants, Inc., of the Pacific Northwest Annual Conference of the Methodist Episcopal Church. All the remainder of his estate, subject to his wife's life estate, and the son's right to the income from $30,000, and his absolute estate in certain realty, was devised to respondent in

trust for the concededly charitable purposes of providing support or education for boys and girls, providing support for the poor, aged and infirm, and erecting a home for the aged as a memorial to the testator and his widow. (R. 63.)

At the time the will was executed the wife's half interest in the community estate was approximately one quarter of a million dollars. At that time she was about 80 years of age, an invalid with a brief life expectancy and of fixed habits of simple frugality. (R. 87.)

The widow entered into a stipulation approved by the Superior Court of the State of Washington for Walla Walla County on May 9, 1938, for the partition of the estate (R. 115-164), the effect of which was to permit the widow to receive only the income from her husband's property (R. 88).

The Superior Court of the State of Washington for Walla Walla County entered an order on March 29, 1940, in the matter of the estate of *George T. Welch, deceased, Baker-Boyer National Bank, a corporation, as Executor and Trustee v. State of Washington, Inheritance Tax and Escheat Division,* No. 26994. The order provided in part that the widow had no right to invade the corpus. No appeal was taken from the order of the Superior Court. (R. 70.)

The executor, the respondent herein, filed an estate tax return with the appellant, Henricksen, Acting Collector, of a gross valuation of $226,303.96, and a net valuation of $7,325.42 for estate tax purposes. The estate tax shown on the return and paid by the respondent was $146.50. The executor took as deductions in the return bequests for religious, charitable, scientific and educational purposes, $12,500 to the Board of Conference Claimants, Inc., of the Pacific Northwest Annual Conference of the Methodist Episcopal Church (subject to the life estate of the widow and grandson and $159,035.74 residue, subject to the life estate of the widow and the life estate of the son in $30,000, to the respondent herein as trustee, for the relief of aged, indigent and poor, for the construction and maintenance of a memorial hospital and home and for the support and education of worthy boys and girls. (R. 83.)

The Commissioner raised the gross valuation of the estate to $228,244.50 (not here in question) and increased the net estate to $180,301.68 by the disallowance of the above described charitable bequests, thereby increasing the estate tax $21,417.55, which was paid to the Collector with interest on November 1, 1939, and January 9. 1940. On March 24, 1941, plaintiff paid an additional assessment and interest in the total amount of $1,165. (R. 83-84, 85.)

Timely claims for refund of the amounts so paid were made and rejected by the Commissioner. (R. 84-85.)

On August 19, 1941, the respondent filed an action in the District Court for the Western District of Washington for recovery of the taxes paid, plus interest. (R. 2-49.) The District Court entered a judgment for the total amount claimed plus interest. (R. 92-93.)

STATEMENT OF POINTS TO BE URGED

1. The decision of the Superior Court of Walla Walla County in the suit by the executor against the Inheritance Tax and Escheat Division of the State of Washington is not binding upon the federal courts, nor the appellants. Moreover, the decision is contrary to the law of the State of Washington as determined by its highest court.

2. The stipulation entered into by the executor and the widow and filed in the probate court to the effect that the trustee should take immediately and that the widow was entitled only to the income of the testator's estate is not binding on the federal courts nor on the appellants.

3. Under the law of the State of Washington, the will bequeathed to the widow a life estate, plus.

She had the right to use both the corpus and the income of the estate during her life time.

4. The remainders to charity cannot be valuated with any degree of certainty because the will provides that "no limitation" is placed upon the widow with regard to the estate involved and the District Court erred in not so holding and determining.

SUMMARY OF ARGUMENT

I

A. The decedent's will bequeathed the remainder of his estate to his widow for life—

> including the rents, issues and profits * * * with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death * * * —

in trust to the executor in part to pay the income to his son and grandson for life and the rest to charities. This provision, when considered in the context of the entire will and in light of state decisions, gave the wife the right, without limitation, to the income and corpus of the estate during her life.

B. Since the widow was entitled to spend the principal without limitation, there is obviously no way of ascertaining the amount of the corpus that she would use. In those circumstances the amount of

the charitable remainders was not ascertainable on the date of the decedent's death. They could not, therefore, be deducted from the gross estate under the terms of the statute.

II

The decree of the Superior Court of the State of Washington partitioning the estate, entered pursuant to stipulation of the widow and respondent, was not a decision on the merits of the extent of the widow's estate under the will and is not conclusive here. It was in all respects a consent decree, and the court had no occasion to consider the question on the merits. Since the widow had a right to give up a portion of her estate, the decree may be binding on her, but only the estate she took under the will is relevant.

Similarly, the order of the same court in the action brought against the State Inheritance Tax Division insofar as it dealt with the extent of the widow's estate under the will was not a determination on the merits because the State had no interest in that portion of the decision. Moreover, since neither the widow nor any of the remainder interests was a party to the proceeding, the order did not settle their property rights under the will. Therefore, under well established principles the order is not binding in this proceeding.

ARGUMENT

I

THE WIDOW ACQUIRED A POWER TO INVADE THE CORPUS WITHOUT LIMITATION, RESULTING IN THE UNASCERTAINABILITY AT TESTATOR'S DEATH OF THE AMOUNTS BEQUEATHED TO CHARITY UNDER SECTION 303(a) (3) OF THE REVENUE ACT OF 1926, AS AMENDED

A question precedent to that of whether the amounts of the bequests to charity were ascertainable at the date of testator's death and, accordingly, the amounts deductible from the gross estate for estate tax purposes under Section 303(a) (3) of the Revenue Act of 1926, as amended, *supra*, is the nature of the widow's estate under the will. This, of course, necessitates an interpretation of the will in the light of state law.

A. *The will conferred upon the widow an unlimited power to invade the corpus*

Under the will as modified by a codicil, the testator made two cash bequests of $500 each. In Article V he made a bequest to his widow in the following language (R. 12):

> I do hereby give, devise and bequeath unto my said wife, Carrie Welch, for and during her life time, should she survive me, all the rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits

> therefrom, and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, neverthelss, for the uses and purposes hereinafter mentioned, * * *.

By Article VI (R. 13-15) he gave certain realty to his son "as his absolute estate" but "subject to the life estate hereinbefore given." Article VII (R. 16-18), as amended by a codicil (R. 9-11) subject to the life estate bequeathed to the widow, gave $30,000 to the respondent, in trust, to pay the net income to testator's son for life with the remainder over for the relief and support of the poor and the maintenance of the sick or maimed. Article VIII (R. 19-22), also subject to the widow's life estate, establishes a trust of $12,500, the income of which is to be paid to the testator's grandson for life, with the remainder over, including unused net income, to the Board of Conference Claimants, Inc., of the Pacific Northwest Annual Conference, Methodist Episcopal Church. Article IX (R. 22-27), subject to the other provisions of the will, and specifically the widow's life estate, provides a trust with respondent as trustee for the support or education of worthy boys and girls, the relief of the aged, indigent, sick or

maimed and the erection of a memorial home for the aged.

1. The crux of the controversy is the interpretation of Article V. A careful consideration of the section in light of the entire will, we submit, leaves no reasonable doubt that the testator gave his widow a life estate with power to invade the corpus. The section is, in part, that she is to have all the remainder of his estate for and during her life "*including the rents, issues and profits.*" If, as respondent contends, the widow is limited to the income from the property, it is stated ineptly.[1] The language implies more. If rents, issues and profits are included, something quite apart must have been given, and since rents, issues and profits are obviously synonymous with income it follows that the essence of the bequest, of which rents and profits are included, is the corpus.

The clause "*with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof*" seems to provide,

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[1]It will be noted generally that the will is meticulously drawn apparently by a careful practitioner. Yet most of the arguments made by respondent and accepted by the trial court negative the otherwise unmistakable implication, that the draftsman knew how properly to create an intended estate.

as authoritatively as is possible in the English language, that the property was hers without limitation, so long as she lived.[2] If only the right to income for life were intended, the wife could still spend the income as she desired and would be without duty to account. Unless the language is meaningless, it must by an expression aiming to safeguard a greater estate. This is further emphasized by the words that "no limitation is placed on my said wife in any expenditures."[3] And as if that were not clear enough, the testator prefaced the provision by the phrase "with the distinct understanding." Nothing in the entire will receives emphasis in anything like such mandatory language. If no limitation is placed on expendi-

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[2]This is emphasized by contrasting other provisions. The remainder to the son and grandson express very clearly the right only to the income of certain property for life. It is difficult to see how an instrument, if it were intended that it give identical estates to the wife as were given to the son and grandson except for the spendthrift provisions to the latter, could so clearly be drawn with respect to the son and grandson with minute description of the exact estate, but where the wife is concerned, language as sweeping as "distinct understanding that no limitation" is used.

[3]The District Court argued that "expenditures" means to pay out. (R. 72-73.) But the term is not used to limit payments to those from income. That the court found it necessary in its construction to supply the words "of the income" (R. 74) to expenditures, suggests that it was rewriting the will.

tures, the only possible conclusion is that the wife was entitled to spend income and corpus.[4]

Article V contains the phrase, the "then remainder over" upon her death, which connotes the possibility of the corpus having undergone a quantitative change during the tenure of her estate. Its strength is the greater in this regard, in view of the cumulative effect of the other clauses of the same sentence just considered. This interpretation is, moreover, supported by the cases, for they are legion, in which it has been held that "then remainder" and synonymous phrases serve to give to the holder of a life estate to right to invade the corpus. The holdings have been accurately summarized as follows (114 A.L.R. 951):

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[4]The District Court's argument that the provisions only were intended to free the widow from fear of making expenditures from income as corroborated by the solicitude shown for her in Article XII (R. 28-29) where respondent is made executor to free the widow from responsibility, is unrealistic. A life tenant has no duty to account for expenditures out of income as a matter of law as observed, *infra*, and placing no limitations on her expenditures simply has no relation to freeing her from obviously onerous duties of executrix. One provision is a grant of a larger estate, the other merely an explanation of why someone else was to be executor. It corroborates the esteem, indicated throughout the will, in which the testator held the widow. If anything, it indicates that he would be very generous toward her.

> The later cases support the rule stated in the earlier annotations to the effect that the life tenant under a will providing for a remainder over of "what remains", "so much as may remain unexpended," or some synonymous term, is entitled to the possession, control, and use of the entire devised property to be disposed of as he sees fit, though he may make no testamentary disposition of the property nor fraudulently dispose of the same for the purpose of defeating the estate in remainder.

See also *Porter v. Wheeler*, 131 Wash. 482, discussed, *infra*. Added to the importance of the phrase because of its ordinary connotation then, is its significance as a term of art with the probability that it was utilized as such by the lawyer who drafted the instrument.

The District Court concluded that the phrase meant, not that the corpus might be diminished, but that unspent income was to be included in the remainder. (R. 71, 75.) This is completely untenable, in view of (1) the familiar law that a life tenant is entitled to all the income outright (see, for example, American Law Institute, Restatement of the Law of Property, §§ 119, 120), and (2) where the testator intended the remainder over to include income, he expressly so stated as in the remainder after the termination of the son's estate (R. 16-17) and that termi-

nating the grandson's (R. 20).[5] In this connection, the use of "then remainder" should also be compared with the language pay over "and deliver the *principal* of said trust fund" (Italics supplied) which describes the remainder after both the son's and grandson's estates. (R. 16, 20.) The conclusion is hardly escapable that avoidance of the use of the term "principal" to describe the content of the remainder after the wife, in view of its consistent use elsewhere in the will, underlines the usual significance to be given "then remainder" and synonymous expressions.

Porter v. Wheeler, 131 Wash. 482, is similar to the instant case on its facts. The testator provided for his wife as follows (p. 484):

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[5]The District Court's query, "How can we say that the testator did not assume that the period when the net incomes might not all be used would be during his wife's life estate?" (R. 75) is answered by the express language of the will. The description of the remainder to include unexpended income, is used only after the termination of the son's and grandson's estate. Moreover, with respect to them, a trust was created with directions to the trustee to pay income "so long as he can personally use and enjoy the same"; (R. 16, 19) not to pay if the amount could be taken by their creditors; and was to be forfeited entirely in case of bankruptcy (R. 18, 21). The wife's interest was, however, clearly not in trust, so that there could be no limitation on payment of income to her—she pays to herself. There could then be no unused income after the wife's estate, which would be segregated from her other property.

> I give, devise and bequeath to my wife Mary Wheeler Porter all the balance of my property, real, personal and mixed of which I may die seized, * * * to be used and enjoyed by her during her lifetime; and at her death, I will that all of said property not used for her support and comfort, go to my said son Alvah Porter.

The case arose when the testator's son sought to have himself decreed the owner of the remainder after the testator's wife's death because her will left the property to others. The court said (pp. 486-487):

> * * * the language of the will does not limit her right to the bare use of the property in the sense of limiting her right to income therefrom with a view of preserving the property during her lifetime), but manifestly gives her the right to support and comfort from the property even though it be consumed in furnishing her support and comfort during her lifetime.

The court concluded that the widow had unlimited use, and power to dispose, of the property during life, but could not dispose of it by will or other method to take effect at death.

If a will providing that property "is to be used and enjoyed during her lifetime" gives, under Washington law, power to invade the corpus, a will providing "for and during her lifetime" property "including the rents, issues and profits therefrom * * * with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may

make for any purpose or any accounting be made thereof," *a fortiori* gives power to invade the corpus; i.e., a life estate plus.

The provision in the *Porter* will, "I will that all of said property not used for her support and comfort" is similar to the "then remainder" provision here and the Washington court attached the significance to it which we urge.

2. Respondent's principal argument below was that other sections of the will are inconsistent with interpreting Article V as giving the widow power to invade the corpus in that her interest in all other places is referred to as a life estate. This argument assumes that life estates and the power to invade are inconsistent provisions. The law in Washington and the weight of authority is, however, directly contrary. *In re Gochnours' Estate*, 192 Wash. 92; *In re Bolstad's Estate*, 200 Wash. 30, 35; *In re Ivy's Estate*, 4 Wash. 2d 1, 5-6; American Law Institute, Restatement of the Law of Property, §111.[6]

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[6]The Restatement states the proposition as follows: "A form of limitation effective to create an estate for life * * * is not prevented from creating an estate for life * * * by the fact that such form of limitation is accompanied by further language effective to create in favor of the conveyee a power, either limited or unlimited, to dispose of the complete property in such land."

The *Gochnour* case, for example, involved the question arising out of a state inheritance tax controversy, whether an estate for life with power to alienate was nevertheless a life estate. The court held that Jacob Gochnour took a life estate notwithstanding his absolute power of disposal during his lifetime.

3. The District Court was impressed with extrinsic evidence of the testator's intention. Thus the court stated (R. 68-69):

> Under the uncontradicted testimony admitted in evidence it appears that at the time the will was executed the wife's half interest in the community estate approached a value of a quarter of a million dollars; that when the will was made she was about eighty years of age, an invalid, with a brief life expectancy, and of fixed habits of simple frugality. Certainly the income from her one-half of the community estate plus the income from the life estate in her husband's property provided by his will made absolutely unnecessary any invasion by her of the corpus of any portion of her husband's estate.

Yet it is settled law in Washington that a will is to be construed, whenever possible, from its language "unaided by extrinsic facts". *In re Phillips' Estate*, 193, Wash. 194, 197; *Shufeldt v. Shufeldt*, 130 Wash. 253, 258. And were it proper to resort to this evidence, it does not support the court's position; moreover, the court's conclusion is plainly irrelevant, for whether it is necessary to invade the corpus is of no

significance if the husband in fact gave her the power. The court apparently confused the problem of interpretation of the will with such cases as *Ithaca Trust Co. v. United States*, 279 U. S. 151, where the will provided for use of the corpus if necessary for support and the controversy was not what the will provided but whether a Section 303(a)(3) deduction was permissible on a given interpretation. These cases are referred to in Point 1 B, *infra*. Nor is the evidence of her frugality, advanced age, ill health and independent wealth material on the issue of testator's intention to give her only the right to income. It would seem rather that respondent has proved too much, since it is beyond question that her own estate was many times over adequate to support her during her brief life expectancy. If the testator were only interested in her support, he need have left her nothing. It is more probable to assume that his esteem for his wife after more than fifty years of married life was such that he wanted to give her the same dominion over his property as he himself had had, reserving only the right to name the recipients of what was left after her death.[7] Certainly a consideration of the entire will does not show that the

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[7]The support which the trial court found in the fact that if the widow has a right to invade the corpus, the son and grandson might take nothing

charities were his chief concern. Apart from the two specific bequests of but $500 each, his first concern was for his wife in language without limitation except for the power to dispose at her death. Nor is this a case in which evidence shows that the testator had a strong attachment for a particular charity since, apart from the relatively modest bequest to the Board of Conference Claimants of the Methodist Episcopal Church, the remainder to charity runs the gauntlet of charitable generalities, covering almost every possible charitable purpose from education and support of children through "maintenance of the sick or maimed" to "relief and support of the aged, indigent and poor." (R. 28.)

4. The District Court attached great signifi-

(R. 75-76), is illusory. In view of the limited remainder he left to the son and grandson and the spendthrift provisions (R. 17-18, 20-22), and those cutting off the son and grandson, if they should contest, or aid in contesting the will (R. 27-28), plus the fact that they were to take nothing until the termination of the wife's estate, is indicative that the testator was not solicitous of their interests. The extreme deference the will expresses for the widow as opposed to the next remaindermen leaves little doubt that it was intended that the widow might so utilize her estate as to destroy the next remainders. The District Court's conclusion that the widow received no right to the corpus because then she could destroy the son's remainder, is without support, moreover, elsewhere in the will.

cance to the fact that the will gave the trustee power to sell and use the principal of the income while not doing so with respect to the widow's estate. (R. 65.) This is clearly misplaced emphasis in view of the fact that it is customary and highly desirable from the fiduciary's point of view to have spelled out in detail his power with respect to the corpus. And since the will was drafted only after conferences with the prospective trustee, (R. 179-181) presence of these powers as a protection to the trustee is not surprising. It was obviously unnecessary to enumerate such powers as selling, investing and reinvesting in light of the more inclusive language used with respect to the widow's estate and to have done so might have had the effect of limiting the estate. Cf. *Mead v. Welch*, 95 F. (2d) 617 (C.C.A. 9th), and see footnote [8], *infra*.

5. The District Court relied on the *Mead* case as supporting its interpretation of the will. Although this Court there concluded that the widow took only a life estate, the differences in the language of the will and California law with relation to which the will was properly construed makes the case quite different. The case, on the contrary, tends to support our position. The pertinent part of the will there involved provided (p. 618):

> * * * will and direct that there be paid and distributed to her [his wife] all my property, real,

> personal, and mixed, for and during her natural life, and for her own use, with power to sell, convey, assign, transfer, collect, invest, and reinvest the same, or any part thereof, or the proceeds thereof, or any part thereof. 2nd. Of the property constituting my estate at her death, I will and direct that the sum of Two hundred thousand ($200,000.00) dollars in money or property be transferred to the trust executed by myself and wife * * *.

The Court stated the Government conceded that the language gave only a life estate (p. 618) were it not for the language "of the property constituting my estate at her death." But in view of the power of the wife to "sell, convey, assign, transfer, collect, invest, and reinvest", it is clear that if that language gave only a life estate, the "of the property constituting my estate at her death" clause is consistent with the interpretation that it described the changed composition of the corpus rather than its diminution,[8] unlike the more inclusive granting clause to the widow here and the "then remainder" clause with its quantitative

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[8]Thus in the *Mead* case an estate for life with power to sell, invest, reinvest, etc., was interpreted as giving no right to invade the corpus. The language indicates a fiduciary interest such as is a trustee, or a life tenant with respect to the remaindermen. The trial court's reliance then on the lack of enumeration of these powers in designating the widow's estate in the instant case, although given to the trustee, is (1) inconsistent with the *Mead* decision and (2) unsound in principle as argued, *supra.*

rather than qualitative connotation in the context of the entire will.

Furthermore, as the Court pointed out, the granting clause limited the property "for her own use" which, under California law, conveyes only a life estate.

6. The trial court found merit in the contention that a decree of distribution entered by the Superior Court (R. 138-164), pursuant to stipulation (R. 115-137), and a later determination by the same court arising out of a state inheritance tax controversy (R. 102 - 104) is conclusive on the Commissioner (R. 71). The question whether they are conclusive is discussed in Point II, *infra*. The Court said that in any event the decrees are persuasive of the proper interpretation of the will. (R. 71.) We think that conclusion erroneous. The decree of distribution divided the properties so that the respondent, as trustee, took the testator's half of the community property immediately. In other words, the widow was willing to have the property constitute a trust fund with income to her for life. In view of the complete absence of any words of trust in connection with the widow's estate, the many phrases indicating more than a trust beneficiary interest and the precise words of trust used elsewhere in the will when

a trust was intended, the agreement to partition is clearly a distortion of the will. By this, of course, we impute no unworthy motive to the parties. The widow was at liberty to have the property so treated. But we are only concerned with the interests transferred at testator's death and not those resulting from the widow's voluntary contraction of her interest. See *Taft v. Commissioner*, 304 U. S. 351, 357-358; *Davison v. Commissioner*, 81 F. (2d) 16, 17 (C.C.A. 2d); *Robbins v. Commissioner*, 111 F. (2d) 828 (C.C.A. 1st). Thus where, as in the *Taft* case the executor made a payment pursuant to the promise of the testatrix, and in the *Davison* case the legatee voluntarily relinquished a power of appointment, and in the *Robbins* case a compromise agrement was made specifying amounts to charity, it was held that although the charities in fact received gifts as a result of the promise, relinquishment, and compromise, respectively, they were not transfers or bequests within the meaning of Section 303(a)(3) and hence the amounts were not deductible. In view of this settled rule of law, the consent decree of the Superior Court is not persuasive since the interpretation of the will, if that it be, embodied in the decree, puts a much greater strain on the language of the will than even the respondent's position here, occasioned, no doubt, by the fact that the widow permitted the property to go to

the remainder interests named by the testator not because the will required it but because she so desired. Since it is a charitable deduction for a gift by the decedent, which is here involved, the widow's waiver of her rights is ineffective. *Watkins, et al., Exrs. v. Fly* (C.C.A. 5th), decided June 4, 1943 (1943 Prentice-Hall, par. 62, 677), and opinion on July 7, 1943, denying taxpayer's petition for rehearing (1943 Prentice-Hall, par. 62,738).

Nor is the decision of the Superior Court in the action brought by the respondent against the State Inheritance Tax and Escheat Division in the least persuasive. The controversy with the State was limited to whether the charitable bequests were for use within the state (R. 164-166), and so appears on the face of the Court's order (R. 102-104). Nevertheless, the respondent, after assessment of the deficiencies here in question, asked the Superior Court to determine also that the widow had no right to invade the corpus of the estate she took. Since the widow had already stipulated that her interest was so limited and, so far as appears, no one contested it except the Commissioner of Internal Revenue, the action must be viewed as a consent decree obtained without the real party in interest, the Commissioner. Rather than being persuasive of the proper interpretation of the will, the action so instigated by respondent is indicative

that it was so doubtful of its position that, for whatever use could be made of it, a determination by a court which had only one side presented to it was sought and obtained. It is patent that the fact that the State of Washington which had a claim for more than $30,000 in taxes did not appeal, is irrelevant to the soundness of that part of the decision in question, since the State had no interest in the wife's power to invade. That the court below found support for its interpretation of the will in this fact (R. 70) is, we respectfully submit, indicative of the unsoundness of the result reached.

B. *Since the amounts of the bequests to charity were not ascertainable, they may not be deducted in computing the net estate under Section 303 (a) (3)*

If the Court accepts the position that the widow acquired the right, without limitation, to invade the corpus ,the amounts charity will receive, if any, are unascertainable. We need not labor the point that if the widow had discretion to do anything she desired with the money, except dispose of it at her death, we are without a semblance of a standard, at testator's death, by which to measure what the charities will receive. The deduction must therefore be denied. *Ithaca Trust Co. v. United States*, 279 U. S. 151; *Humes v. United States*, 276 U. S. 487; *Gammons v. Hassett*, 121 F. (2d) 229 (C.C.A. 1st), certiorari denied, 314

U. S. 673; *Commissioner v. Merchants Nat. Bank of Boston*, 132 F. (2d) 483 (C.C.A. 1st), certiorari granted May 3, 1943.

The trial court relied on the *Ithaca* case for the conclusion that the deduction must be permitted even if it be assumed that the widow has the right to invade the corpus of the estate. (R. 71.) But in the *Ithaca* case the life beneficiary was given the right to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." (P. 154.) The Supreme Court held (p. 154) that under the terms of the will, "The standard was fixed in fact and capable of being stated in definite terms of money. *It was not left to the widow's discretion.*" (Italics supplied.) Here, on the contrary, there is no standard; all is left to the widow's discretion.

The facts found by the trial court, such as that the widow was over eighty years of age, an invalid, independently wealthy and of fixed habits of simple frugality, indicate only that she need not invade the corpus to maintain her standard of living and are irrelevant because she was not limited in her use of the corpus to that purpose. Such facts do not aid in establishing whether she would make gifts of portions or all of the estate.

Similarly, the District Court's findings that the widow had never expressed any wish to invade any of the corpus of her husband's estate, is not relevant because the determination of the value of the remainder must be in light of facts known at testator's death.[9] See *Ithaca Trust Co. v. United States*, *supra*. In the *Ithaca* case the Court, upon permitting a deduction, was required to decide the method of valuing the life interest. The Court held that although the life beneficiary died within six months of the testator, her interest must be valued, not in terms of what actually happened, but rather the probabilities (as could be estimated by mortality tables) at the date of testator's death.

The recent decision of this Court in *Commissioner v. Bank of America, Etc.*, 133 F. (2d) 753, is not inconsistent with our position. There the testator bequeathed the remainder of his property in trust to

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[9]Nor, of course, is the fact relevant that the widow by stipulation, relinquished all rights to the corpus (R. 115-164), because, as explained in Point 1 A, *supra*, the amounts ultimately going to charities pass pursuant to the widow's agreement notwithstanding the stipulation purporting to interpret the will and not as "bequests, legacies, devises or transfers" within the meaning of Section 303(a)(3) of the Revenue Act of 1926, as amended. *Taft v. Commissioner*, *supra; Davison v. Commissioner*, *supra; Robbins v. Commissioner*, *supra*.

pay his sister $3,000 a year for the rest of her life (p. 753)—

> and in case she should, by reason of accident, illness, or other unusual circumstances so require, such additional sum or sums as in the judgment of said trustee may be necessary and reasonable under existing conditions.

with remainder to certain charities. The Court held that the standard as fixed exhibited no greater uncertainty than that in the *Ithaca* case. In the *Bank of America* case, the trustee had a semblance of a standard; here the widow may do whatever she desires—a circumstance which as noted, *supra*, the Court in the *Ithaca* case expressly pointed out was not there present. (p. 154.) The case is therefore distinguishable.

But if this Court should conclude that the *Bank of America* case is not distinguishable from the instant one, we respectfully urge this Court's reconsideration of its position there. We urge the position approved by Judge Haney, in his dissenting opinion (p. 755) that the proposition long since adopted in the Treasury Regulations should be upheld, if for no other reason because of the long-continued consistent interpretation of the statute by the regulations during which there have been Congressional re-enactments of the statute. *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 99. Article 47 of Treasury Regulation 80, *supra*,

provides in part that in the case of the existence of the power to invade the corpus by the legatee, to a use or purpose which would have rendered it, to the extent that it is subject to such powers, not deductible had it been directly so bequeathed, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The test is, thus, that no deduction is allowable where the life tenant is given the power to invade the corpus unless the power of invasion is restricted by standards measurable in terms of money. While it may be said that a good guess could be made of the requirements of the life beneficiary in *Bank of America*, the quality of the standard was different from that in *Ithaca Trust Co.*, and it would seem substantially less capable of prognostication. The apparent overwhelming weight of authority consistent with the Regulations is that the extent of the power of invasion must be definitely ascertainable in terms of money. The ascertainability of the probable course of events will not suffice—they must be certain. See, in addition to the *Ithaca Trust Co.*, *Humes*, *Gammons* and *Merchants Nat. Bank of Boston* cases cited, *supra*, *Burdick v. Commissioner*, 117 F. (2d) 972, 974, certiorari denied, 314 U. S. 631; *Knoernschild v. Commissioner*, 97 F. (2d) 213 (C.C.A. 7th); *Pennsylvania Co. for Insurances, Etc. v. Brown*, 6 F. Supp. 583

(ED. Pa.) affirmed *per curiam*, 70 F. (2d) 269 (C.C.A. 3d).

It is to be noted that the Supreme Court, on May 3, 1943, granted certiorari to the First Circuit in *Commissioner v. Merchants Nat. Bank of Boston, supra*, presumably because of the conflict in principle with this Court's decision in *Bank of America*. If the Supreme Court should reverse the decision in the *Merchants Nat. Bank* case, this Court should, nevertheless, deny the deduction here because unlike that case, it is not possible to say as of the testator's death as the First Circuit conceded could be done in the *Merchants Nat. Bank* case that it is improbable that the life beneficiary would invade the corpus.

II

NEITHER THE STIPULATION FOR PARTITION OF THE ESTATE APPROVED BY THE STATE COURT NOR ITS ORDER IN THE ACTION BROUGHT BY THE RESPONDENT AGAINST THE STATE INHERITANCE DIVISION IS CONCLUSIVE HERE

The facts concerning the decree of distribution entered by the State Superior Court (R. 38-164), pursuant to stipulation (R. 115-137) and the later determination by that court resulting from the action brought by the respondent ostensibly against the State Inheritance Tax Division are discussed, *supra*, in Point I A on the issue whether the decrees were

persuasive of respondent's interpretation of the will. We are here concerned only with whether as a matter of law they are conclusive in this proceeding.

We conceded at the outset that the extent of the widow's estate is a matter of state law. It does not follow, however, on the authority of *Freuler v. Helvering*, 291 U.S. 35, and the similar cases relied on by the trial court (R. 71), that the Superior Court's decrees are conclusive here. On the contrary, the Court in the *Freuler* case was careful to point out that the state proceeding was not collusive in the sense that the parties had joined in submitting an issue on which they were in agreement. It stated that (p. 45) "The decree purports to decide issues regularly submitted *and not to be in any sense a consent decree.*" (Italics supplied.) Here it is beyond question that the decree of partition was entered on stipulation.[10] (R. 138-

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[10]The petition to the Court (R. 115-138) entitled "Stipulation" stated (R. 116):

> Whereas, said Baker-Boyer National Bank of Walla Walla, Washington, in its capacity as such Executor and Trustee, and the said Carrie Welch as such surviving spouse of decedent, have mutually agreed upon a mutual and equal distribution of the residue of said community estate, and after being fully advised of all their legal rights in respect thereto do hereby Stipulate and Agree upon a partition and division of said community estate between the respective parties hereto in manner following:

164.) The implication of the *Freuler* decision is that a consent decree such as this, is not conclusive on the Commissioner. Any other result would leave the door open for the parties to rewrite their interests at the expense of the federal revenue. And the issue has already been so resolved. *First-Mechanics Nat. Bank v. Commissioner*, 117 F. (2d) 127, 130 (C.C.A. 3d); *United States v. Mitchell*, 74 F. (2d) 571, 573 (C. C. A. 7th); *Journal Co. v. Commissioner*, 44 B.T.A. 460, 468 In the *First-Mechanics Nat. Bank* case, the decedent's son had a claim against the estate paid by the executor with the approval of the beneficiaries for which the executor took credit in a final account approved by the state probate court. The Third Circuit held that although such a claim, even though not legally enforceable, might be allowed, it "cannot affect the tax liability of the estate."[11]

Similarly, the order of the Superior Court in *George T. Welch, Deceased, Baker-Boyer National Bank, a corporation, as Executor and Trustee v. State*

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[11] As the Seventh Circuit succinctly pointed out in the *Mitchell* case, *supra*, the fact that the probate court allows a claim has no bearing on its deductibility under Section 303 (a) (1) because—

> One may pay a claim which he is under no legal obligation to satisfy. He may make gifts. He may waive legal defenses and, prompted by most commendable motives, assume and pay obligations that have no legal basis for support.

of Washington, Inheritance Tax and Escheat Division (R. 102-104), insofar as it is relevant here, was a non-adversary proceeding. The only controversy with the State of Washington was whether the charitable trusts were limited to the State of Washington (R. 164-166) and this appears on the face of the order (R. 102-103). After deciding the state tax question, the court stated (R. 103)—

> * * * and the executor and trustee herein having raised the question that he is entitled to instructions from the court directing as to * * * the terms of said will * * * —

the order then providing that the widow was entitled only to the income for life. (R. 103-104.) Since neither the State nor anyone else[12] has any interest in the court's determination whether the widow could invade the corpus, the issue cannot be said to have been decided on its merits in an adversary proceeding.

Moreover, the decision did not determine property rights within the meaning of *Freuler v. Helvering, supra*, and *Blair v. Commissioner*, 300 U. S. 5, 10. Neither the widow nor the remainder interests was a party to the proceeding. The proceeding therefore could not determine their rights under the

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[12]The widow had previously stipulated a relinquishment of any right to the corpus of the estate.

will. See *Security First Nat. Bank of Los Angeles, Executor v. Commissioner*, 38 B.T.A. 425.

CONCLUSION

The judgment of the Court below is erroneous and should be reversed.

Respectfully submitted,

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